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Title IX Sexual Harassment Training

Emporia State University – April 2024

Agenda

- Title IX Scope & Jurisdiction
- Intake and Supportive Measures
- Navigating Investigations
- The Hearing
- Informal Resolution and Other Processes
- Case Law and Regulatory Update



Evolving Regulations



- This training is based on currently-operative sexual harassment regulations (August 2020)
- We will highlight potential changes that may result from proposed regulations that are not yet effective
- The effective date and final language of proposed regulations have yet to be determined
- Litigation may challenge final regulations once effective

Title IX Scope & Jurisdiction

What is Title IX?

“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

34 C.F.R. § 106.31

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To which entities does Title IX apply?

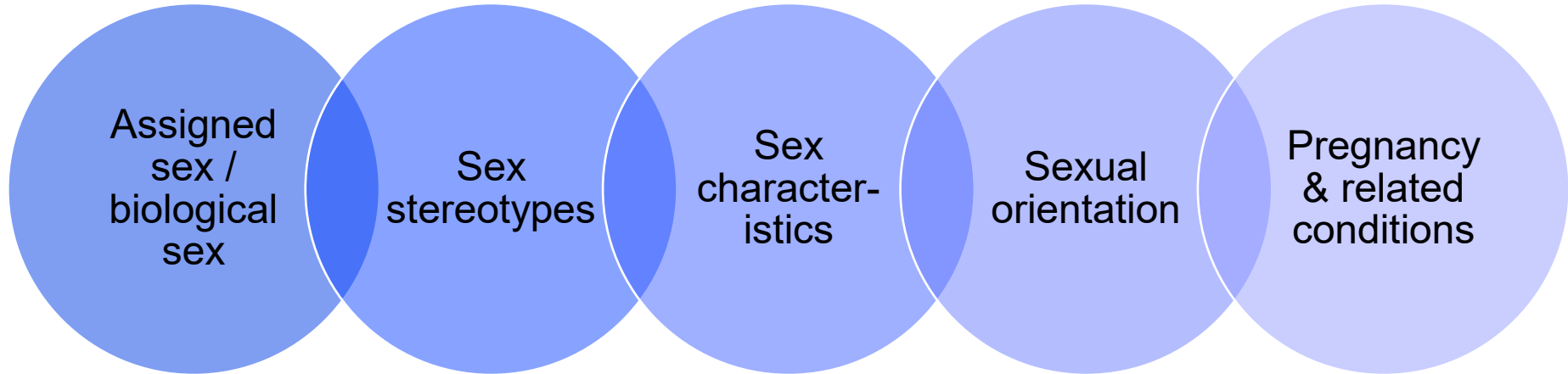


Entities that receive federal financial assistance, including colleges and universities that participate in U.S. Dept. of Ed. Federal Student Aid funding

- Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that do apply to individual persons

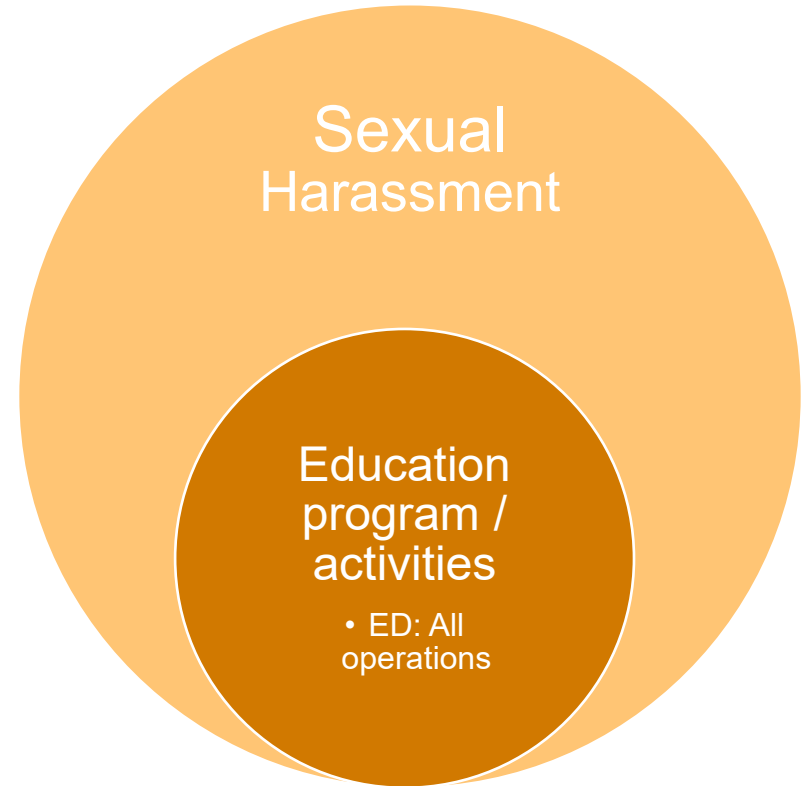
Likely Change: “On the Basis of Sex”

- Proposed regulation would provide:
 - “On the basis of sex” includes:



What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in a private location that is not part of education program/activity



What are examples of education programs and activities?

Admissions

Financial Aid

Athletics

Housing

Academics

Employment

Concerts,
Performances,
and Events on
Campus

Clinical
Rotations and
Placements

Organized Trips
and Volunteer
Outings

Sponsored
Organization
Activities

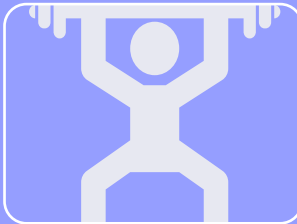
Online Programs

Activities in
Property Owned
or Controlled by
the Institution

Likely Change: Expanded Scope of Conduct Subject to Heightened Regulatory Requirements



Proposed regulation requires grievance procedures for all forms of sex discrimination



Proposed regulation continues to require more rigorous procedures for “sex-based” harassment

Does Title IX apply to sexual harassment in other countries?

- No – the U.S. Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment



What other policies might apply?

Institutions are free to use:

- Student code of conduct
- Faculty handbooks
- Other policies

to address sexual harassment that does not occur in an education program or activity

What is sexual harassment?

Conduct on the basis of sex that is:

Quid
pro quo
harass-
ment

Hostile
environment
harassment

Sexual
assault

Dating
violence

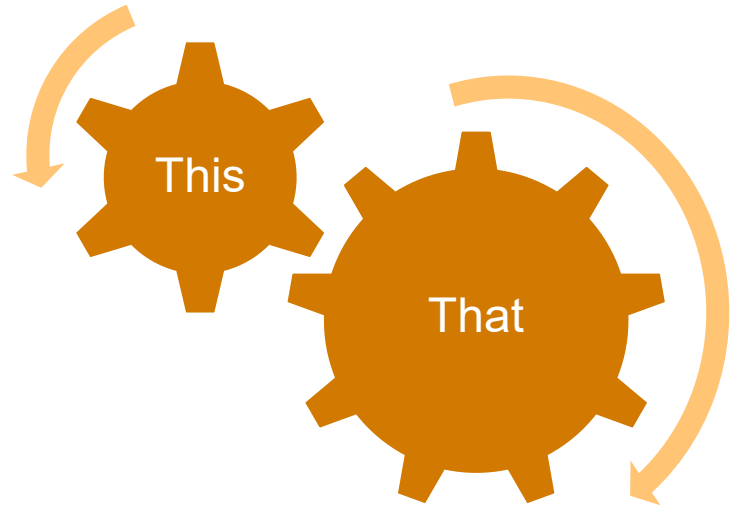
Domestic
violence

Stalking

What is quid pro quo?

An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct:

- Often arises in the employment context or where an employee holds a position of authority over a student or other employee



What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



How do we determine if a hostile environment exists?

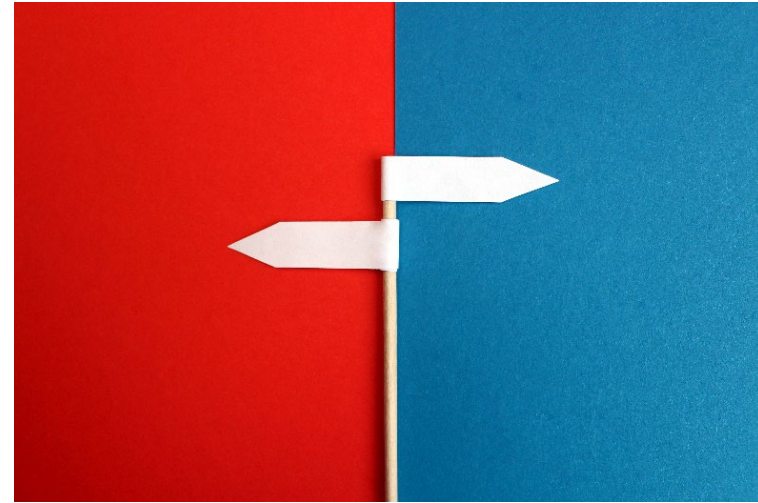
Consider all the facts and circumstances, such as:

- The type of misconduct
- The frequency of the misconduct
- Where the misconduct occurs
- Whether a power differential exists, etc.

From the perspective of a reasonable person

Likely Change: “Hostile Environment”

- Proposed regulation would alter to:
 - Severe or pervasive
 - Evaluated subjectively and objectively
 - Denies or limits a person’s ability to participate in or benefit from programs and activities
 - Considering numerous facts and circumstances



Does refusal to use chosen names and pronouns create a hostile environment?

- Federal law does not (presently) mandate the use of chosen (a/k/a “preferred”) names or pronouns for any student (cisgender, transgender, or otherwise)
- But the refusal to use chosen names and pronouns based on protected status and/or the use of non-chosen names and pronouns based on protected status may constitute discrimination or harassment based on the facts

What is sexual assault?

Title IX regulations initially defined “sexual assault” as incorporating the following classes of conduct from FBI’s NIBRS:

Rape

Sodomy

Sexual assault
with an object

Fondling

Incest

Updated NIBRS Classifications

Rape

Statutory Rape

Fondling

Incest

What is rape?

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

What is consent?

- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

What is statutory rape? (Revised NIBRS)



Nonforcible sexual intercourse with a person who is under the statutory age of consent.

What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.



EXAMPLE: Incapacitated

Student A and Student B have had several prior sexual encounters. One night, Student A provides Student B with drugs that, unknown to Student A, are laced with fentanyl. Student B takes the drugs voluntarily and then falls into a stupor and cannot speak coherently. Student A who has only smoked marijuana, then has sex with Student B.



EXAMPLE: Not-incapacitated

Damon and Jeremy attend a football tailgate. Each have six beers over the course of three hours. Instead of going to the game, Damon and Jeremy decide to hookup at Damon's on-campus apartment. Each separately drives from the tailgate without incident to Damon's apartment where the two have sex and then fall asleep for a few hours. Later, Damon claims he was too drunk to consent. Multiple people from the tailgate recall having conversations with Damon and Jeremy about the game, who was likely to win, and renovations planned for the stadium.



What is fondling?

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

What is domestic violence?

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

What is dating violence?

“Dating Violence” is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

EXAMPLE: Dating violence

Kace and Jamie have hooked up, occasionally spend the night at each other's apartments, and text each other frequently. One night, during an argument, Jamie throws Kace's phone at Kace. The phone misses Kace but hits the wall and is destroyed.



What is stalking?

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; **or**
- Suffer substantial emotional distress.



EXAMPLE: Stalking

Alfie and Hana broke up after Alfie took an interest in Mira. Hana sends Alfie dozens of text messages each day begging Alfie to dump Mira and return to Hana. In the messages, Hana uses expletives and threatens to kill Mira. One night, while Alfie and Mira are having dinner at a sports bar, Hana loudly confronts Alfie and Mira and throws a drink in Alfie's face.

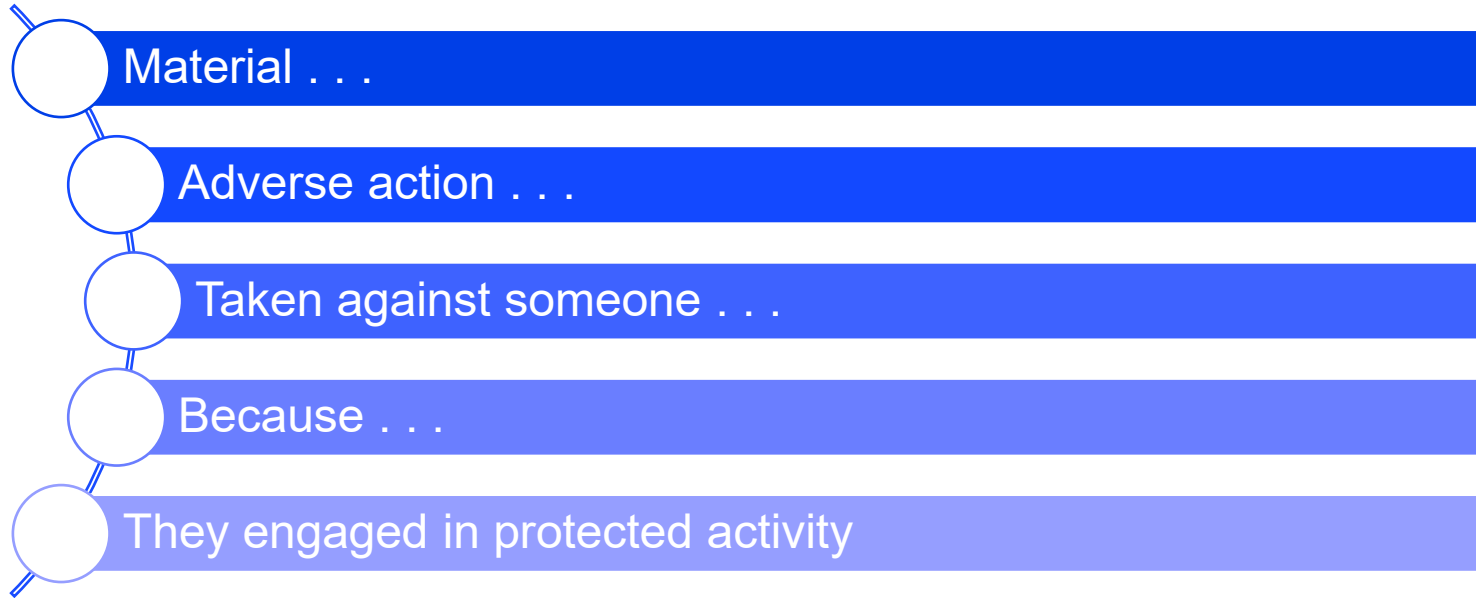


Does Title IX also prohibit retaliation?

- Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy.

(34 C.F.R. § 106.71)

Retaliation



Retaliation

“It is prohibited for the University or any member of the University’s community to take materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy and procedure.”

EXAMPLE: Retaliation

Groundskeeper testifies at hearing in support of Office Worker's complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.



Intake and Supportive Measures

What is the grievance process?

Report, Intake,
and Supportive
Measures

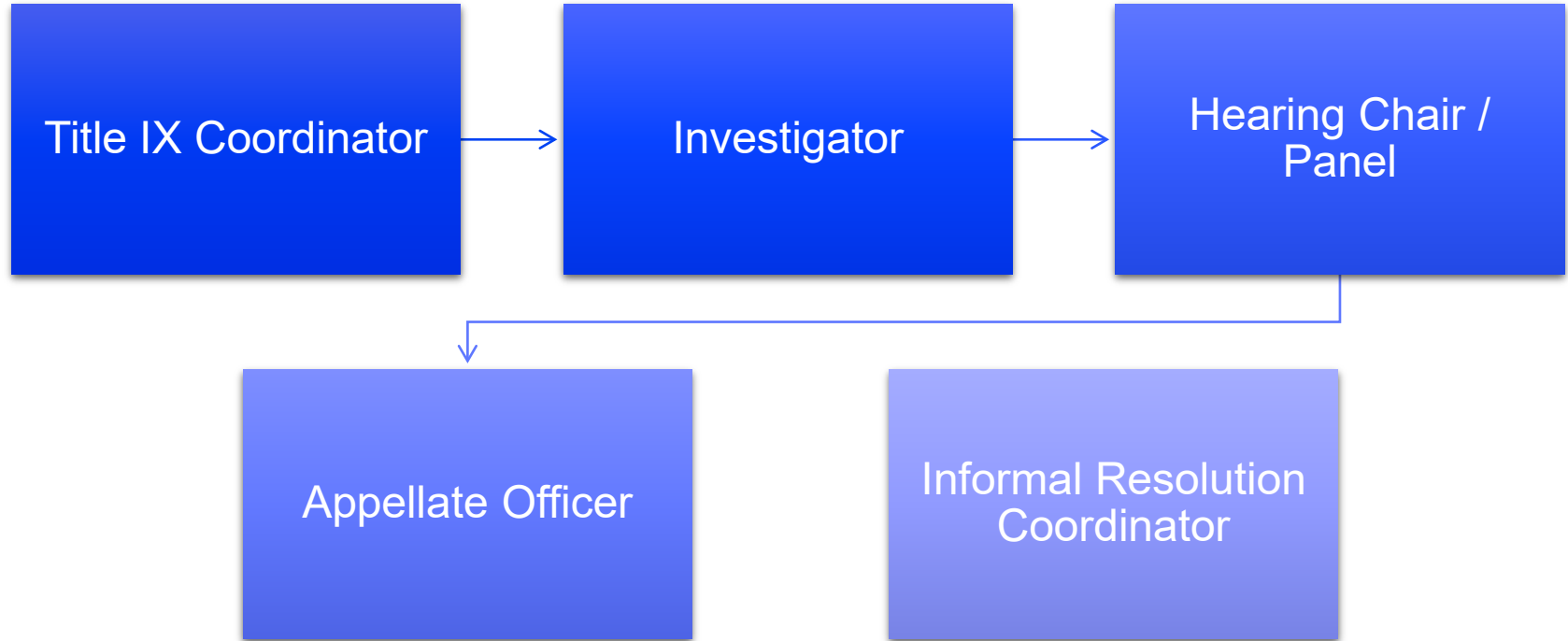
Formal
Complaint
(Complainant's
or, sometimes,
institutional
option)

Investigation to
collect relevant
inculpatory and
exculpatory
evidence

Live hearing
before a decision-
maker who finds
facts under an
evidentiary
standard and
determines the
existence (or not)
of a policy violation
and any resulting
sanctions /
remediation

Appeal

Who are the key institutional actors in the grievance process?



Administrative Contacts

- Complaints, reports, or notice of alleged policy violations should be made to:

Title IX Coordinator
1 Kellogg Circle,
Plumb Hall, 209E,
Emporia, KS 66801
(620) 341-5518

What general principles govern the grievance process?

- Significant deference to the complainant's wishes about whether to proceed
- Equitable treatment of complainants and respondents
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- No stereotypes based on a party's status as complainant or respondent
- Conflict and bias-free institutional participants
- Trauma-informed



How does an institution get notice of sexual harassment?



Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.

What is “actual knowledge”?

“Actual knowledge” occurs when

- An institutional official, with authority to take corrective action
- Observes or receives a report
- Of sexual harassment occurring in the institution’s education programs and activities

Mandatory Reporting

- **ALL** employees are “Responsible Employees” who must promptly share with the Title IX Coordinator all known details of a report made to them in the course of their employment, with the exception of the following confidential resource employees:
 - Licensed counselors in the Counseling Center
 - Legal Counsel
 - Licensed medical staff in the Student Health Center
- “Employees must also promptly share all details of behaviors under this policy that they observe or have knowledge of, even if not reported to them by a Complainant or third-party.”
- Failure of Responsible Employees to report an incident is a violation of University policy and can be subject to disciplinary action for failure to comply

When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes



What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

Likely Change: Supportive Measures

Proposed regulation would provide:

- May be no more restrictive of respondent than is necessary
- Either party affected by a decision regarding supportive measures must be allowed to appeal to an impartial employee
 - Respondent must be allowed to challenge supportive measures that burden respondent before they are enacted, except in an emergency



Likely Change: Supportive Measures Cont'd

Proposed regulation would provide:

- Supportive measures may also be shared with another party “only if necessary to restore or preserve that party’s access to the education program or activity.”
- Either party must be allowed to seek modification or termination of supportive measures “if circumstances change materially.”
- Supportive measures that burden a respondent must be terminated at the conclusion of the grievance procedures


Examples of supportive measures



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 Counseling

 Academic accommodations

 Counseling accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order implicated by facts

Supportive Measures

ESU 3D.0108 Policy

- Supportive measures may include:
 - Referring to counseling, medical, and/or other healthcare services
 - Referring to the Employee Assistance Program
 - Assisting with visa and immigration
 - Counseling for student financial aid
 - Referring to community-based service providers
 - Altering campus housing assignment(s)
 - Altering work arrangements for employees or student-employees
 - Preparing a safety plan
 - Providing campus safety escorts
 - Supporting no contact directives between parties
 - Providing academic support / extensions of deadlines / other course/program-related adjustments
 - Issuing a University No Trespass notice
 - Issuing timely warnings
 - Modification of class schedule, withdrawals, or leaves of absence
 - Increasing security and monitoring of certain areas of the campus
 - Any other actions deemed appropriate by the Title IX Coordinator

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EXAMPLE: Reasonable supportive measure

Employee is the victim of domestic violence perpetrated by their spouse in the college's parking lot. Employee requests time off from work for one hour every Thursday for six weeks to attend counseling sessions.



EXAMPLE: Reasonable supportive measure?

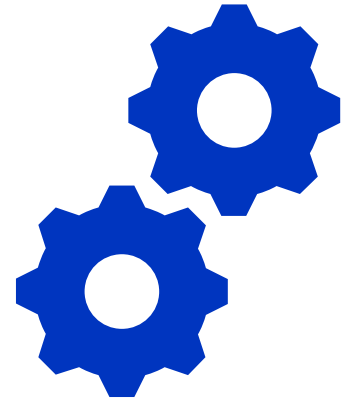
Student reports they were sexually assaulted by a peer 18 months ago. Student requests a refund of tuition for the last three semesters and a change of all grades to “Pass.”



Do students and employees have other rights?

Yes—other laws may trigger accommodations when a medical condition or disability is present:

- Americans with Disabilities Act
- Family and Medical Leave Act
- Section 504 of the Rehabilitation Act
- Title IX pregnancy accommodation provisions



Can supportive measures affect the respondent?

- **Yes**, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process

Are supportive measures confidential?



- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with employees who have a legitimate need to know

Privacy

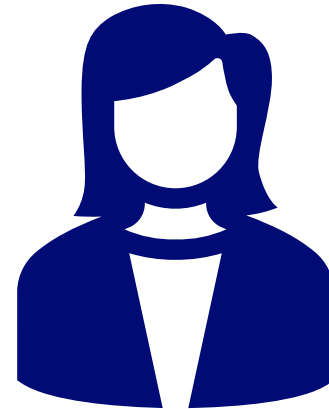
- “The University will not share the identity of an individual who has made a report or complaint of harassment, discrimination, or retaliation; any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, or any witness, except as permitted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g; FERPA regulations, 34 CFR part 99; or as required by law; or to carry out the purposes of 34 CFR Part 106, including the conducting of any investigation, hearing, or grievance proceeding arising under these policies and procedures.”

Privacy Cont'd

- “Typically the following employees will be informed of a complaint:
 - Title IX Coordinator and/or designee
 - Division of Student Affairs and Student Conduct
 - University Police and Safety
 - Threat Assessment Team
- Information will be shared as necessary with Investigators, Hearing Panel members/decision-makers, witnesses, and the parties

Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one person



Can we utilize interim removals or suspensions for students?

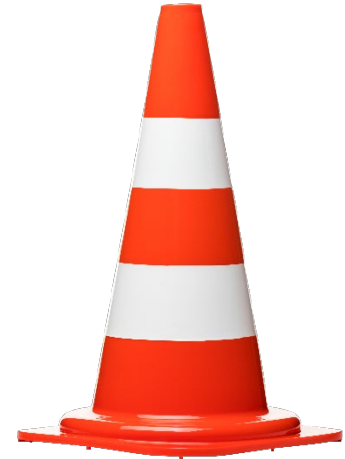
Students may be removed on emergency basis if:

- Individualized safety and risk analysis
- Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
- Student is given immediate notice and opportunity to contest the removal

Likely Change: Interim removals

Proposed regulation would provide:

- Interim removals or suspensions can be utilized when there is an “immediate and serious threat to health or safety.”
- Requirement of “physical” threat is removed



Can we utilize an already existing process for interim removals?

Yes, if that process complies with the Title IX standard.

Common examples include:

- Threat assessment policy
- Critical Incident Response Team (“CIRT”)
- Interim suspension provisions of a Code of Conduct



Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (e.g., Employee Handbook)

EXAMPLE: Administrative leave

Maintenance worker is accused of lingering near the restroom and glancing at students in various stages of undress. Maintenance worker was accused of similar behavior five years prior. Maintenance worker is not accused of physical violence. Institution places worker on administrative leave pending results of the investigation.

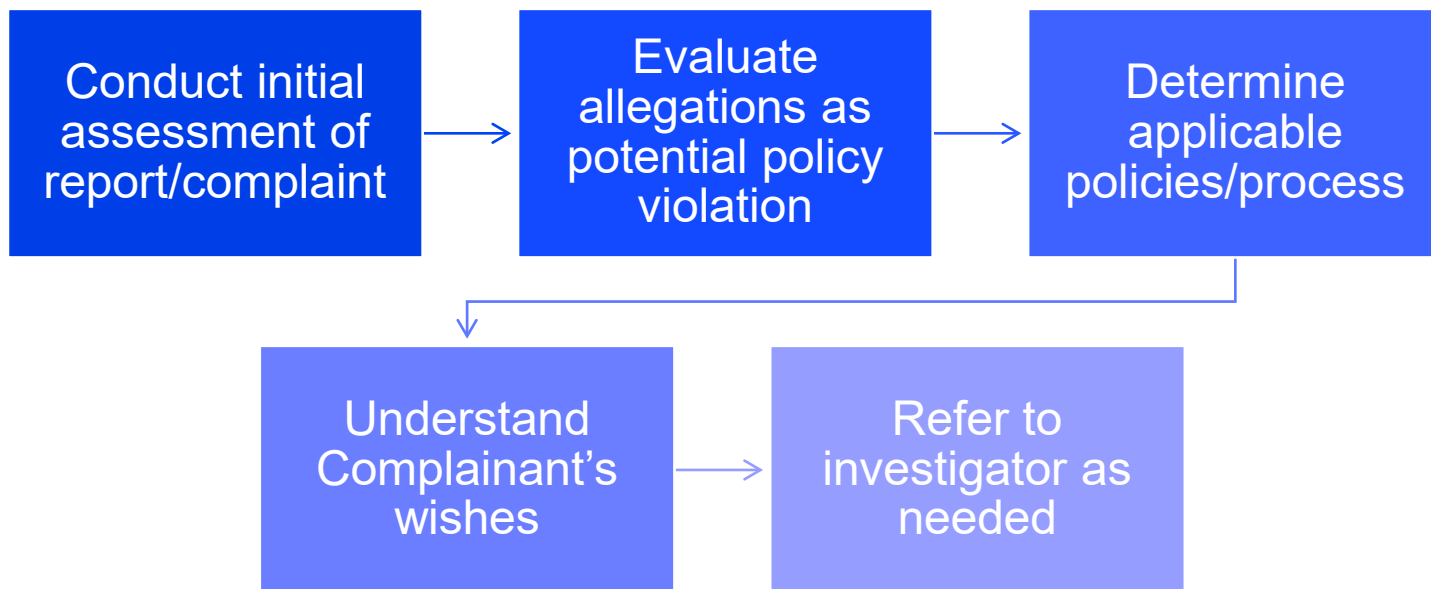


Navigating Investigations

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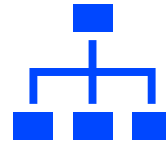
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Intake process



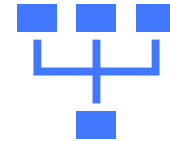
Can we consolidate the complaints?

Yes – Complaints can be consolidated if they arise out of the same facts and circumstances

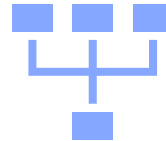


Multiple respondents

Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant



What is the purpose of Title IX investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred

What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding

What is a formal complaint?

- Signed writing
- From the alleged victim or the Title IX Coordinator
- Alleging sexual harassment
- Indicating desire to initiate the grievance process (i.e., investigation)

When must we dismiss a Title IX complaint?



- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint

When may we dismiss a Title IX complaint?

- Complainant withdraws allegations in writing
- Respondent is no longer employed or is no longer a student
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination



EXAMPLE: Dismissal

After student files a verbal harassment complaint against assistant coach, assistant coach resigns and takes a job at another institution. Institution codes the former assistant coach as a “no rehire” in its system and dismisses the complaint.



How do we tell the parties about an investigation?

The institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating.



What else does the notice need to say?

Written notice must also include:

- Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
- That parties have the right to an advisor of their choice
- That parties have the right to inspect and review evidence
- Any prohibition on providing knowingly false statements or information

Student accuses Employee of quid pro quo harassment. Prior to sending written notice, Title IX Coordinator appoints investigator who schedules interviews with Employee's co-workers. Only after these interviews are complete, does the investigator send a written notice to Employee.

**Example:
(Incorrect)**



Can we gather any information prior to the written notice?

- Yes, but only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are *true* is investigatory and should await the written notice

Likely Change: Express Coverage of Preliminary Investigation

Proposed regulation contemplates preliminary investigation:

- To determine identities of the parties
- To clarify allegations prior to dismissing on the basis they could not constitute sex discrimination

Student submits formal complaint via email with a single sentence reading, “Named Student sexually assaulted me.” Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about what happened—the “who, what, when, where, and how.”

Example: (Preliminary inquiry)



EXAMPLE: Preliminary inquiry

Complainant alleges they were fondled by an unknown individual in the library late at night. Title IX Coordinator secures video footage and card swipe data to determine the identity of the alleged perpetrator.



How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

How do you structure an interview?



Rapport building/information providing phase



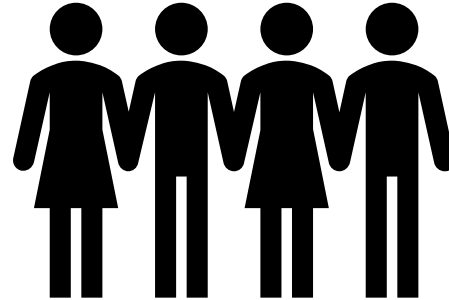
Substantive testimony collection



Closure/information providing phase

Who do we interview?

- Parties
- Fact witnesses
- Maybe character witnesses
- Maybe experts



What's the difference between a fact witness and a character witness?

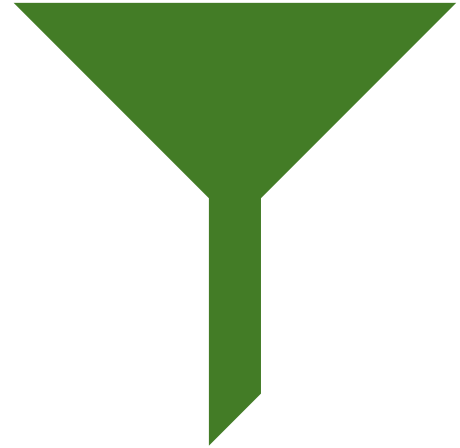
- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of sexual harassment occurred
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition

Likely Change: Experts

Proposed regulation would provide that institutions have discretion to allow or not allow expert witnesses, as long as the rule applies equally to the parties.

How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions (“recognition prompts”) as long as possible
- Avoid suggestive or leading questions



Examples of open invitations



“Please tell me what happened that night.”



“Walk me through what happened.”



“In your own words, tell me what occurred.”



“Please tell me everything that happened after you got to the party.”

Examples of facilitators



Examples of cued invitations



“You mentioned that
Can you tell me more?”

“You said that Can
you elaborate?”

“You said they ‘coerced’
you. Can you tell me what
they did?”

“If I understood you right,
you said that after
Can you tell me what
happened in between?”

Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

Free tools!

- Stop
- Look
- Listen



Complainant has accused respondent of hostile environment sexual harassment. Respondent admits to the alleged conduct, but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that complainant stopped attending work at the institution.

Example: Interview practice



- What did complainant say about work?
- What did you observe about complainant's attitude towards going to work?
- Before the respondent's conduct, did complainant go to work?
- Did you notice any changes in complainant's behavior after the respondent's conduct?
- After the respondent's conduct, did complainant still go to work?
- Are there any records that would show when complainant went to work before and after the conduct? Time cards? Performance reports? Sign-ons?

Example questions:
For witnesses
(effective denial of access)



Respondent is accused of stalking complainant by lurking around complainant's car twice. Respondent has admitted to the first instance but denies the second. Complainant reported clearly seeing the respondent's face the first time at the car but the person was not as clearly in sight the second time.

Example: Interview practice



- Tell me more about what you saw the second time? Did you actually see the respondent's face? What else do you remember about the person's appearance or attire?
- Does having seen respondent at your car before lead you to believe respondent was there the second time? Could it have been someone else?
- Do you actually know it was respondent the second time?
- Have you had any other interactions with respondent? (Explore each)

Example questions: For complainants (course of conduct)



- Why do you believe this conduct is directed at you?
- As to either incident, why was respondent at the car? Was there anything suggesting respondent went there to see you? Could there have been other reasons for Respondent's presence?
- What did respondent do at the car each time? What did you do? Did either of you say anything?

Example questions:
For complainants
(directed at a specific person)



- What day/time did this happen?
- Where did it happen?
- How far was respondent from you?
- Was there anyone else around?
- How tall are you and how much do you weigh? How old are you? Same for respondent
- What has the impact of this been on you? Did you tell anyone about it?

Example questions: For complainants (Fear/distress)



Managing Trauma, Conflicts of Interest, and Bias

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Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias

What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

Examples of impermissible stereotypes



“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”

An employee who is chosen to serve as an appellate officer also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."

Example: Bias



What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

What is trauma's impact on the brain?



- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
 - Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, overwhelming the system going forward

How do we approach trauma in a Title IX case?

Balance

- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”

- *Candace Jackson, Acting Asst. Secretary of ED (2017)*

What does it mean to be “trauma informed”?

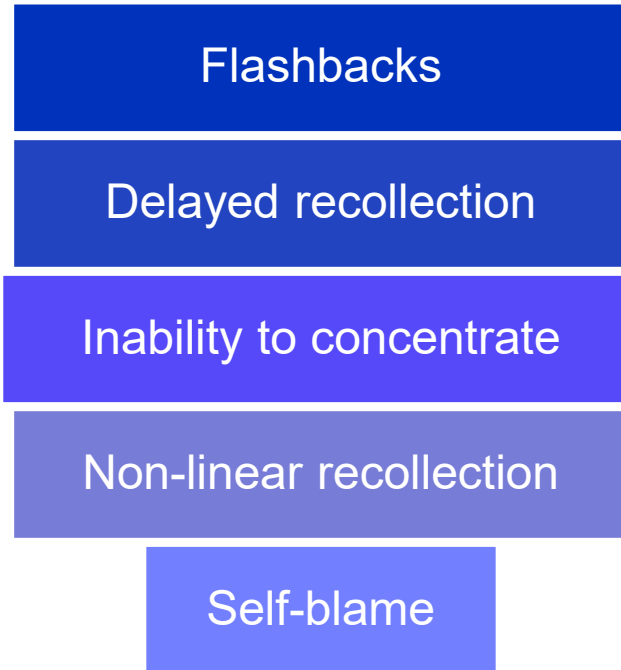
- Title IX regulations do not define the term
- There is no standard or commonly accepted definition
- In practice, it means:
 - Prompt provision of supportive measures such as counseling to address the immediate and ongoing effects of trauma
 - Understanding the neurobiology of trauma and its impact on a victim’s neurobiological functioning
 - Adopting investigation and hearing techniques that minimize the risk of exacerbating trauma while still being fair and impartial

When does trauma affect a person?

- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual's response during proceedings
- Not just complainant

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:



Physical reaction



- Brain—Trauma triggers chemical reaction which impacts:
 - Perception
 - Ability to React
 - Memory
- Everyone reacts differently

Trauma-informed interviews

- Provide information to the individual
- Acknowledge the difficult situation
- Describe the process
 - Your role
 - Policy
 - Communication
- Avoid requiring recitation of information already provided, if possible

Investigating & trauma

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
 - Safety/comfort
 - Choices
 - Support for person
 - Personal support
 - Available services
 - Remain objective on facts
 - Trustworthiness/transparency

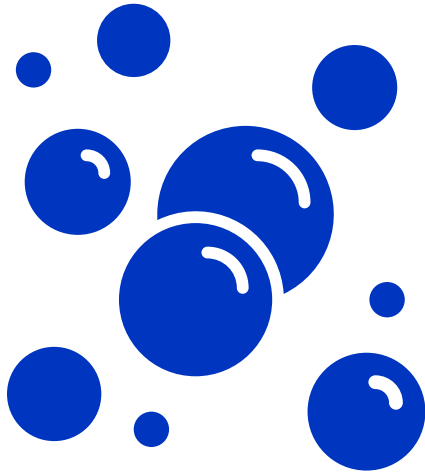


Trauma-informed interviews Cont'd

Important to focus on: What are you *able* to tell me about your *experience*?

- Allow individual to begin where they want
- Allow an uninterrupted statement
- Use follow-up questions (non-leading)

Trauma-informed interviews (cont.)



- Instead of asking “why,” ask about what witness was thinking during the experience
- Consider asking about memories associated with the senses:
 - Sights
 - Smells
 - Feelings

Trauma & credibility

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements

Amnesty

- Parties and witnesses are provided amnesty from minor policy violations, such as underage consumption of alcohol or related use of illicit drugs, to encourage reporting and participation in the Title IX process
- Amnesty does not extend to more serious allegations, such as physical abuse of another or illicit drug distribution

Gathering Evidence and Investigation Reports

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How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview



How do we make a record of the interview?

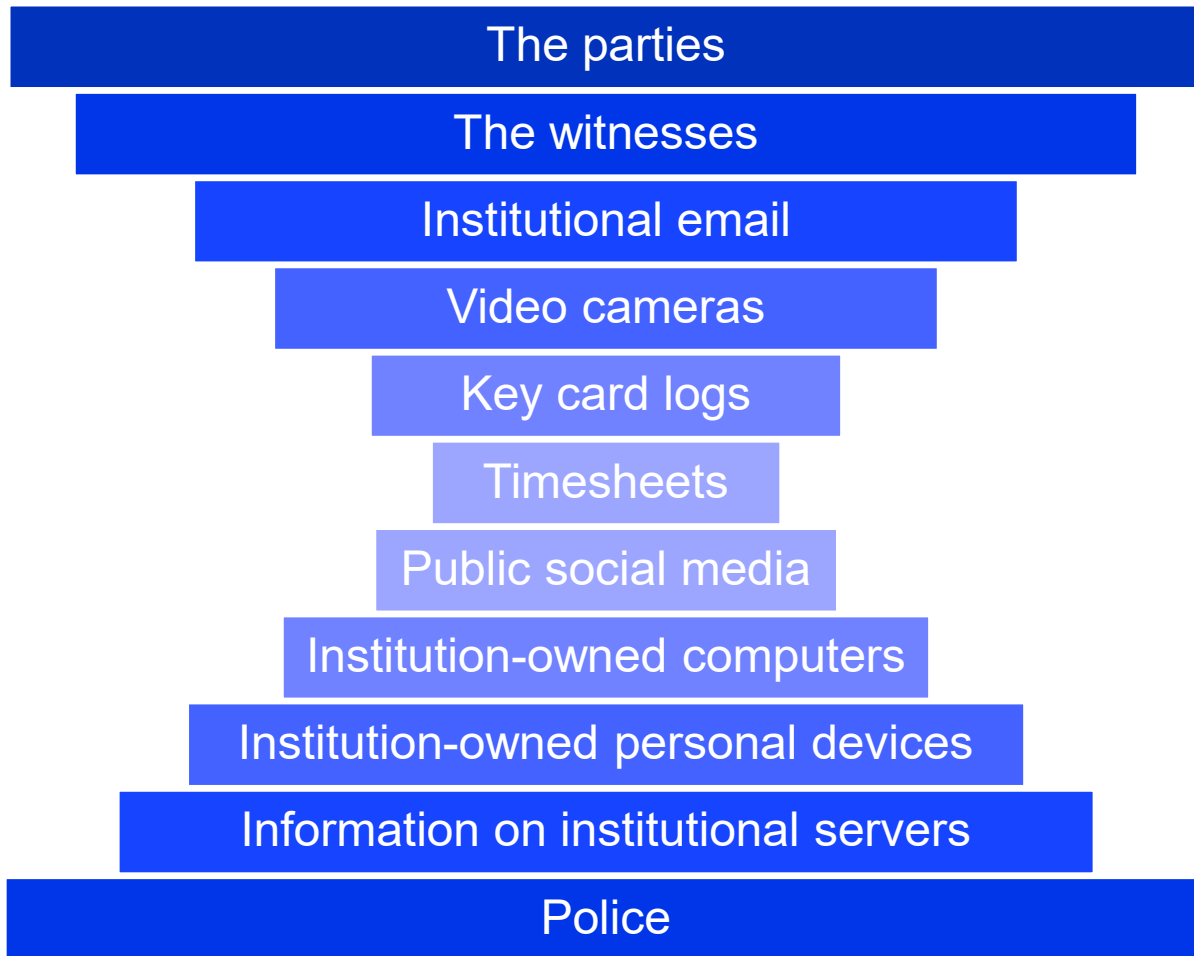
- Trend towards audio recording
- Extensive note taking followed by preparation of a summary is permissible
- Video recording is disfavored



Example sources of non-testimonial evidence



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May an investigation collect evidence on sexual history?

Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if offered to prove that someone other than the respondent committed the conduct, or if evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent.

May an investigation collect and rely on privileged records?



- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

EXAMPLE: Permissible collection

Complainant executes a written release allowing Title IX investigator to obtain a copy of notes from Complainant's counseling session in which Complainant reported alleged rape to counselor the day after it's occurrence.



Investigation Report Critical Elements

- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of proof
- Evidence gathered/considered
- Evidence/Facts
 - Investigation:
 - Inculpatory and exculpatory evidence
 - Agreed upon and disputed material facts

Important Language Considerations

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - Reference potential “violation of policy” not “guilt” or violation of “law”
 - Keep in mind that decision-makers will generally assess credibility of facts, not witnesses as a whole, but-for specific circumstances
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”

Common “Mistakes” in Report-Writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Speculation

Do the parties have access to the evidence?

- Parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally



What exactly has to be shared?

- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared

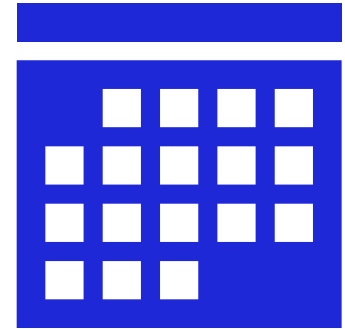
Transcript of interview with complainant contains 10 minutes of initial discussion about complainant's supportive measures and access to counseling. Can the investigator redact this portion of the transcript before sharing with the parties?

Example



Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report



After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor. Is this permissible?

Example



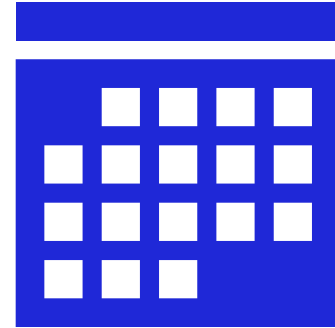
After completing all interviews, investigator prints the evidence and tells parties they can schedule a time to review it in a conference room without cell phones. They are not allowed to take the evidence outside the room.

Example:
(Impermissible)



How is the investigation concluded?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing (if applicable)

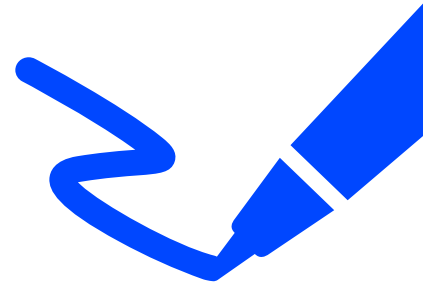


Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulations, factual findings and determinations of policy violations are made by a decision-maker

Do the parties get to comment on the investigation report?

- Yes
- Parties are permitted to “review” and provide “written response” to investigation report



May parties have an advisor during the investigation?

- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during the investigation phase



Advisors

- Parties have the right to an Advisor to accompany them to all meetings and interviews
- The University is not obligated to provide a party an Advisor who is an attorney, even if another party has an Advisor who is an attorney

Hearings

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What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

Who is the “decision-maker”?

- A single hearing officer; or
- A hearing panel led by a chair



What standard of evidence can be used?

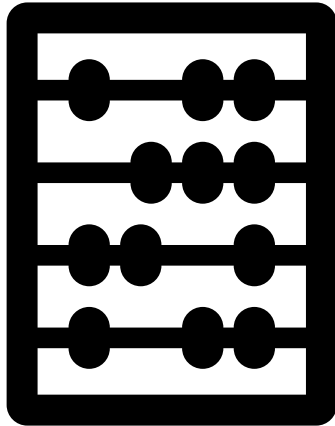
- Either
 - Preponderance of the evidence OR
 - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

What happens before the hearing?

- Parties are provided the final investigation report at least 10 days prior to the hearing
- “Decision-maker” must be identified and clear conflicts of interest assessed
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre-hearing conference should be held

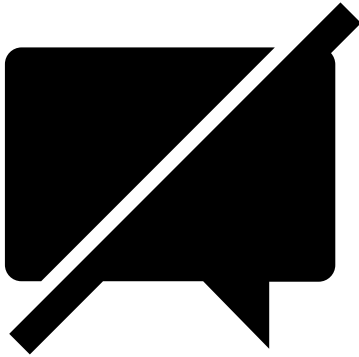


What are some key elements of a hearing?



- Live testimony from witnesses
- Contemporaneous questions from the decision-maker and cross-examination from the advisor for the other party
- Decision-maker must screen all questions for relevance and intrusion into prohibited sexual history
- Hearing must be recorded or transcribed
- Steps to separate parties, if requested

What about the “exclusionary” rule?



- Exclusionary rule contained in 2020 regulation is no longer enforceable
- Decision-maker may consider all statements, even if witness is not subject to cross-examination
- Decision-maker may consider the absence of cross-examination in assigning weight and credibility
- **Note:** Certain public institutions in certain jurisdictions may be required to enforce exclusionary rule as a matter of procedural due process

How do(es) the decision-maker(s) decide a case?



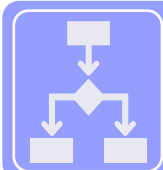
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

Assessment of credibility



- Line up facts relevant to credibility
- Factors (among others)
 - Plausibility—Is the testimony believable and does it make sense?
 - Specificity
 - Motive to falsify—Does the person have a reason to lie (other than mere status as party)?
 - Corroboration/consistency/contrary evidence—Is there testimony or evidence that corroborates the witness account? Are the witness accounts consistent? Are inconsistencies explained? Is there evidence disputing the witness account?
 - Past Record—Does the person have a history of similar behavior?

What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as: credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.

Weight - Considerations

- Believability/probability/plausibility
- Apparently honest and sincere
- Consistent
- Unrefuted
- Corroboration
- Lacking motive/disinterested
- Expertise
- Level of detail
- Unbiased
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay



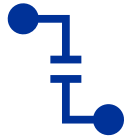
Who determines discipline and remediation?



- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued

What are the grounds for appeal?

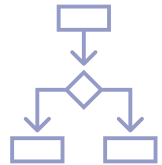
Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter;



New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

EXAMPLE: Appeal

Respondent appeals and submits evidence that one member of a three-person hearing panel previously wrote gushing letters of recommendation for complainant. Hearing panel member did not self-disclose the letters when selected to serve on the panel.



Informal Resolution and Other Processes

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What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



Types of informal resolution

Mediation

Facilitated discussions led by Title IX Coordinator

Restorative justice

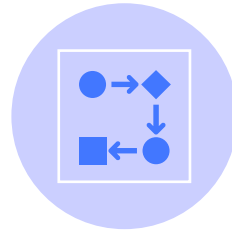
Attorneys for parties negotiate an agreement

Arbitration without a live hearing

What are the key concepts of informal resolution?



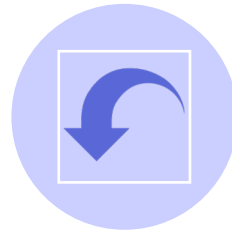
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



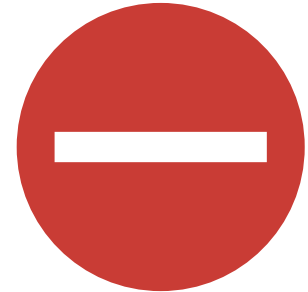
The parties must voluntarily agree to participate in writing



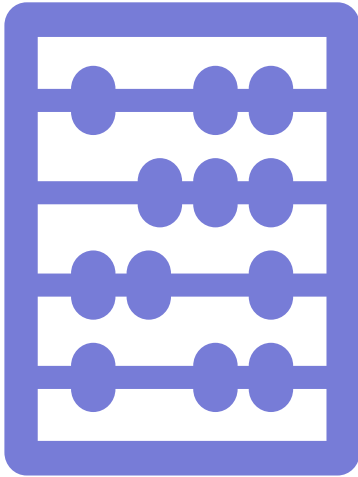
The parties must be allowed to withdraw from informal resolution up until the point it is final

What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Cannot require persons to consent to informal resolution as a condition of employment or enrollment



What are considerations around whether informal resolution is appropriate?



- Nature of the alleged offense
- Any ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Any past findings regarding respondent
- Status of the parties
- Good faith participation of the parties

Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

What is restorative justice?

“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr

How does restorative justice compare to general informal resolution?

General Informal Resolution

- No guided or structured preparation
- Immediate parties only
- Shared responsibility/no obligation to accept responsibility
- Solution: Compromise
- Focus on facts/evidence

Restorative Justice

- Substantial preparation
- Community & institutional participation
- Acceptance of responsibility
- Trauma-informed safeguards
- Focus on repairing relationships & restoring trust

Common features: trained facilitators; shuttle negotiation; described as “mediation”

Can a case that is resolved informally be “reopened”?

- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question

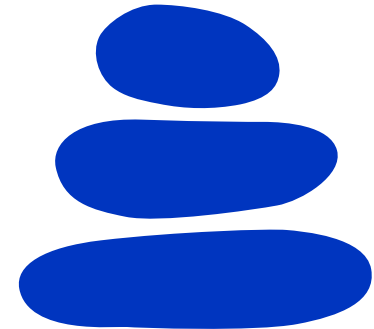


How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted

May we use another process after Title IX?

- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy



May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ

What other policies/processes may apply?

- Title VII policy
- Consensual relationships policy
- Professionalism policies
- Student code of conduct
- Threat assessment
- Employee handbook provisions
- Faculty handbook provisions
- Contractual provisions

May we conduct a “joint” investigation?

- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence



Why would an institution continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid “passing the harasser” scenario
- Community expectation
- Large investment of time and resources to date
- Potential for respondent's return in the future
- Other factors possible

Can we use another process to make the same finding we would otherwise make under Title IX policy?

- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” as defined by Title IX that occurs in institution’s educational programs or activities



Case Law & Regulatory Update

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Political update: “Sex”

Mar. 8, 2021 Executive Order

- Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
- Authorizes the Secretary of Education to take additional action to enforce this policy

June 16, 2021 Guidance

- Department of Education says Title IX prohibits discrimination based on sexual orientation and gender identity

Regulatory update

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments – over 235,000 comments submitted



2022 proposed regulations

Scope of Coverage

- Explicitly includes as forms of sex discrimination under Title IX discrimination based on pregnancy, sexual orientation, gender identity, sex stereotypes, or sex characteristics



2022 proposed regulations Cont'd

Hostile Environment

- Modifies the definition of hostile environment sexual harassment to align with Title VII
- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity

2022 proposed regulations Cont'd

Jurisdictional Scope

- Title IX does not apply to sex-based harassment occurring (1) outside an institution's education program or (2) outside the U.S. where it does not contribute to a hostile environment in institution's education program or activity in the U.S.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority"
- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if contributes to a hostile environment within an educational program or activity

2022 proposed regulations Cont'd

Retaliation

- Refines definitions of retaliation to include “intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in an institution’s Title IX process.”
- Adds definition of peer retaliation: retaliation by one student against another student

2022 proposed regulations Cont'd

Retaliation

- Refines definitions of retaliation to include “intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in an institution’s Title IX process.”
- Adds definition of peer retaliation: retaliation by one student against another student

2022 proposed regulations Cont'd

Include explicit protections for students and employees based on pregnancy or related conditions, including childbirth, termination of pregnancy, or lactation.

Institutions would be required to provide reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.

2022 proposed regulations Cont'd

The proposed regulations would expand the scope of protections for pregnancy or related conditions by prohibiting institutions from discriminating against a student or employee based on current, potential, or past pregnancy or related conditions.

2022 proposed regulations Cont'd

When a student tells an institution's employee about the student's pregnancy or related conditions, the employee must provide the student with the Title IX Coordinator's contact information.

The Title IX Coordinator must inform the student of the institution's obligations to prohibit sex discrimination and also to provide the student with options for reasonable modifications, access to separate and comparable portions of education programs or activities, allow for a voluntary leave of absence, and ensure there is available lactation space that is clean and private.

2022 proposed regulations Cont'd

Reasonable modifications for pregnancy or related conditions would be required to be provided to students based on their individualized needs.

Such modifications may include breaks during class to attend to related health needs, breastfeeding, or expressing breast milk; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; time extensions for coursework and rescheduling of tests; counseling; changes in physical space or supplies; elevator access; or other appropriate changes to policies, practices, or procedures.

Common Policy & Practice Problems

Zero absence attendance policies.

Targeted medical documentation requirements.

Requirements to restart programs from the beginning rather than status at the time a leave began.

Deference to discriminatory clinical site policies.

What are trends in caselaw?

Continued growth in number of respondent-initiated lawsuits alleging:

- Title IX sex discrimination based on status as male
- Due process violations for failure to provide fundamental fairness (public schools)
- Breach of contract for failure to follow policies and procedures in handbooks
- Negligent administration of Title IX policies
- More cases including claims of LGBTQ+ harassment and/or discrimination
- More retaliation cases

Case #1: *Roe v. St. John's University* (2d Cir. 2024)



- Plaintiff was found responsible for two sexual assaults by university
- Plaintiff sues university under Title IX for anti-male bias and for failing to investigate his claim that one accuser made a false allegation of sexual assault on social media
- Plaintiff also brings breach of contract claim against university
- A 2-1 decision affirms the district court's dismissal of Roe's claims

Some Key Takeaways



- To prove “erroneous outcome” theory of liability, respondent/plaintiff must show sex was motivating factor in decision
- An erroneous outcome and typical procedural errors are not enough, by themselves, to show improper motivation
- A singular alleged false accusation of sexual assault on social media is not severe, pervasive, and objectively offensive
- Judges are deeply divided on Title IX respondent cases

Case #2: *MacIntyre v. Carroll College* (9th Cir. 2022)



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- Plaintiff was former golf coach whose contract was non-renewed after coach complained about Title IX (equity) non-compliance and hostile environment and discrimination by athletic director and president
- School settled Plaintiff's internal complaints and agreed to a two-year contract for Plaintiff
- When school elected not to extend two-year contract, Plaintiff sued for retaliation
- Non-renewal of a fixed term contract can be adverse employment action for retaliation

Some Key Takeaways



- Title IX protects employees from retaliation, similar to Title VII
- An adverse action is “one that might have dissuaded a reasonable person” from complaining about discrimination
- It is easier to show adverse action for retaliation purposes than for employment discrimination generally
- A school cannot avoid retaliation by claiming the expiration of a fixed contract is not adverse action

Case #3: *Barlow v. Washington State Univ.* (Wash. 2024)



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- Plaintiff was raped by a peer at an off-campus apartment
- University had prior notice that peer posed a risk of sexual misconduct due to events at another system campus
- University allowed student to transfer to Plaintiff's campus while investigations were pending
- Court holds university has a "special relationship" as a landlord that requires it to both control and protect students who are on campus or involved in university activities

Some Key Takeaways



- Institutions may have a tort law duty to protect students from criminal acts of peers even though students are adults
- Increasingly likely that courts impose a duty of care for sexual misconduct on campus where the risk was foreseeable
- Continued efforts by plaintiffs to expand the duty of care to that similar in a K-12 context
- State tort theories may pose a greater risk of damage verdicts than Title IX

Case #4: *Doe v. Ohio University* (S.D. Ohio 2023)



- Plaintiff reported being sexually assaulted while incapacitated
- After making report, Plaintiff is allegedly called a liar, poked, prodded, and joked at by friends of the respondent, in class
- Professor and institution allegedly did nothing to stop the peer harassment
- Plaintiff's claim survives summary judgment
- But Plaintiff cannot pursue punitive damages or emotional distress damages under *Cummings*

Some Key Takeaways



- Institutions can face Title IX deliberate indifference claims based on peer harassment prompted by a complaint
- The failure to take any action to stop peer-harassment is deliberate indifference
- Supreme Court's *Cummings* decision has substantially narrowed the scope of recoverable damages on Title IX deliberate indifference claims

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